

ESTTA Tracking number: **ESTTA430127**

Filing date: **09/13/2011**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91184978
Party	Plaintiff McNeil-PPC, Inc.
Correspondence Address	LAURA POPP-ROSENBERG FROSS ZELNICK LEHRMAN & ZISSU PC 866 UNITED NATIONS PLAZA NEW YORK, NY 10017 UNITED STATES lrosenberg@fzlz.com
Submission	Rebuttal Brief
Filer's Name	James D. Weinberger
Filer's e-mail	jweinberger@fzlz.com,ghuron@fzlz.com,lpopp-rosenberg@fzlz.com,ykarzoan@fzlz.com
Signature	/James D. Weinberger/
Date	09/13/2011
Attachments	REDACTED WAL-ZYR Rebuttal Brief (F0877206).PDF (25 pages)(104409 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

McNEIL-PPC, INC.,

Opposer,

-against-

WALGREEN CO.,

Applicant.

Opposition No. 91184978

REBUTTAL BRIEF FOR OPPOSER

James D. Weinberger
Laura Popp-Rosenberg
Giselle C.W. Huron
FROSS ZELNICK LEHRMAN & ZISSU, P.C.
866 United Nations Plaza
New York, New York 10017

Attorneys for Opposer McNEIL-PPC, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INACCURACIES IN WALGREENS’ FACTUAL STATEMENT.....	4
ARGUMENT	
I. McNEIL Has Established Priority	7
II. A Likelihood of Confusion Exists	9
A. The WAL-ZYR Mark is Substantially Similar to the ZYRTEC mark	10
B. Walgreens’ “WAL-” Family and “Free Competition” Arguments Fail	12
C. Walgreens’ Evidence of Consumer Care is Self-Serving and Unsupported.....	13
D. Walgreens Prevented Actual Confusion from Being Adequately Measured.....	13
E. Walgreens’ Own Testimony Evidences Its Bad Faith	14
III. The WAL-ZYR Mark is Likely to Dilute the ZYRTEC Mark Under the TDRA	15
A. The ZYRTEC Mark Achieved Fame Prior to Walgreens’ Application	16
B. The WAL-ZYR Mark is Likely to Dilute the ZYRTEC mark	18
CONCLUSION.....	19

TABLE OF AUTHORITIES

FEDERAL CASES

<i>Basic Inc. v. Rex</i> , 167 U.S.P.Q. 696 (T.T.A.B. 1970)	8
<i>In re Bercut-Vandervoort & Co.</i> , 229 U.S.P.Q. 763 (T.T.A.B. 1986)	11
<i>Blansett Pharmacal Co. v. Carmick Laboratories Inc.</i> , 25 U.S.P.Q.2d 1473 (T.T.A.B. 1992)	12, 14
<i>Carnival Brand Seafood Co. v. Carnival Brands, Inc.</i> , 51 U.S.P.Q.2d 1929 (11th Cir. 1999)	7
<i>Chemical New York Corp. v. Conmar Form Systems, Inc.</i> , 1 U.S.P.Q.2d 1139 (T.T.A.B. 1986)	7
<i>Coach Services, Inc. v. Triumph Learning L.L.C.</i> , 96 U.S.P.Q.2d 1600 (T.T.A.B. 2010)	18
<i>Conopco Inc. v. May Dep't Stores Co.</i> , 32 U.S.P.Q.2d 1225 (Fed. Cir. 1994)	13
<i>Dassler KG v. Roller Derby Skate Corp.</i> , 206 U.S.P.Q. 255 (T.T.A.B. 1980)	11
<i>Eli Lilly & Co. v. Natural Answers, Inc.</i> , 86 F. Supp. 2d 834 (S.D. Ind. 2000)	13
<i>Hasbro, Inc. v. Braintrust Games, Inc.</i> , Opp. No. 91169603 (T.T.A.B. Aug. 24, 2009)	11
<i>Hunt Control Systems Inc. v. Koninklijke Philips Electronics N.V.</i> , 98 U.S.P.Q.2d 1558 (T.T.A.B. 2011)	7
<i>John Anthony, Inc. v. Fashions by John Anthony, Inc.</i> , 209 U.S.P.Q. 517 (T.T.A.B. 1980)	8
<i>In re Knox Fertilizer Co.</i> , Ser. No. 77029965, 2010 WL 3351810 (T.T.A.B. Aug. 13, 2010)	11
<i>Lone Star Steakhouse & Saloon, Inc. v. Alpha of Virginia, Inc.</i> , 33 U.S.P.Q.2d 1481 (4th Cir. 1995)	7
<i>Nestle Co. v. Nash-Finch Co.</i> , 4 U.S.P.Q.2d 1085 (T.T.A.B. 1987)	8
<i>Nike, Inc. v. Maher</i> , Opp. No. 91188789, 2011 WL 3828723 (T.T.A.B. Aug. 9, 2011)	<i>passim</i>
<i>Palm Bay Imports, Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772</i> , 73 U.S.P.Q.2d 1689 (Fed. Cir. 2005)	17

<i>Sealed Air Corp. v. Scott Paper Co.</i> , 190 U.S.P.Q. 106 (T.T.A.B. 1975)	11
<i>United Drug Co. v. Theodore Rectanus Co.</i> , 248 U.S. 90 (1918).....	1
<i>Walgreen Co. v. AstraZeneca Pharmaceuticals L.P.</i> , 534 F. Supp. 2d 146 (D.D.C. 2008)	9
<i>Wyeth v. Walgreen Co.</i> , Opp. No. 91165912, 2008 WL 3873423 (T.T.A.B. Aug. 5, 2008).....	3, 15

FEDERAL STATUTES

15 U.S.C. § 1052(d)	9, 15
15 U.S.C. § 1125(c)	15

TREATISES

3A Louis Altman, <i>Callman on Unfair Competition, Trademarks & Monopolies</i>	15
J. Thomas McCarthy, <i>McCarthy on Trademarks and Unfair Competition</i> (4th ed. 2011)	5, 7, 8, 12

After years of litigation before the Board, the exchange and review of thousands of documents, numerous depositions and several contentious motions, Walgreen Co. (“Walgreens”) has in its trial brief *admitted* the very essence of McNEIL-PPC, Inc.’s (“McNEIL”) claim. At page 27 of its brief, Walgreens concedes that the WAL-ZYR mark that is the subject of this proceeding communicates to consumers that the product on which it is used is the “Walgreens version of ZYRTEC.” Applicant’s Trial Brief (“App. Tr. Br.”) at 27. This statement demonstrates precisely why Applicant’s mark is likely to cause confusion and dilution with Opposer’s famous ZYRTEC mark and why the Board must sustain this opposition: Walgreens’ product is *not* the Walgreens version of ZYRTEC; rather, it is a generic allergy medication that has the same active ingredient found in the ZYRTEC product, namely, cetirizine HCl. Rather than communicate the truth, Walgreens has co-opted McNEIL’s brand name, its “commercial signature,” *United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 98 (1918), in order to dupe consumers into believing that there is some special relationship between ZYRTEC and WAL-ZYR, elevating the latter above the dozens of other generic cetirizine HCl products on the market, *none of which* use any component of McNEIL’s ZYRTEC mark.

As Walgreens is well aware, the federal courts have treated with kid gloves generic drugs which contain the same active ingredients as off-patent brand name drugs, whether in connection with “compare to” claims or allowing more similar trade dress than might otherwise be permissible with respect to competing products. As Walgreens is further aware, producers and retailers of generic drugs have a number of tools available to them to adequately communicate to their customers the existence and availability of their products. Despite this knowledge, Walgreens would have the Board believe that if it is not permitted to register the WAL-ZYR mark it will not be able to effectively sell the product. This is utter nonsense and Walgreens knows it. Indeed, the brand name is effectively the *only* tool that the branded-product owner has to differentiate its own product on store shelves and in advertising, not the other way around.

Once the Board gets past Walgreens’ rhetoric concerning the alleged competitive need to use Opposer’s brand name as its own, this proceeding is revealed for what it is: a relatively

straightforward opposition with weak defenses. As to priority, Walgreens completely misses the point, focusing on McNEIL's inability to rely on UCB's registration priority date. Rather, McNEIL is relying on the rights it acquired from UCB's licensee, Pfizer, and its Warner-Lambert subsidiary, along with its own use in connection with the ZYRTEC switch to OTC, which are documented and long pre-date Walgreens' application date. To accept Walgreens' priority arguments would be to ignore the evidence in the record of 15 years of continuous sale and marketing of one of the best-selling pharmaceutical products in the United States, as well as a major documented transaction between two of the largest drug companies in the world.

On likelihood of confusion, Walgreens admits that most of the relevant *DuPont* factors favor McNEIL: the products are effectively identical (allergy medications featuring the active ingredient cetirizine HCl), sold in the same stores to the same people at similar price points, and marketed in the same manner. As to strength of the ZYRTEC mark, Walgreens hardly disputes this; how could it do more given that the mark is coined and its own promotion and sale of ZYRTEC demonstrate the vast commercial reach of the brand? As to similarity of the marks, Walgreens argues that the "WAL-" prefix – which it contends consumers know as indicating that the product comes from Walgreens – as well as the fact that it only took the first syllable of McNEIL's ZYRTEC mark for WAL-ZYR serves to tilt this factor in its favor. But Walgreens' own documents show that not all of its generics are "WAL-" branded and that consumers do not recognize "WAL-" formative products to originate from Walgreens exclusively. More significantly, Walgreens *admits* that the ZYR portion of the WAL-ZYR mark is intended to communicate to customers that the product is the "Walgreens version of ZYRTEC." App. Tr. Br. at 27. This is also a concession on bad faith: it reveals how Walgreens intentionally chose a name for its generic cetirizine HCl product that told consumers it was ZYRTEC, when it was not. And the lack of actual confusion in the marketplace is not surprising since Walgreens, which owns all the retail outlets where both ZYRTEC and WAL-ZYR are sold together, has no internal means of tracking consumer complaints at point of purchase in the first place. In any

event, it is well settled that actual confusion is not required to prove likelihood of confusion. Walgreens' position on the remaining factors is unconvincing as well.

Moreover, Walgreens fails to disclose that one of its "WAL-" formative marks as used on a generic allergy medication was previously found to be likely to cause confusion with the brand name trademark by this Board. *See Wyeth v. Walgreen Co.*, Opp. No. 91165912, 2008 WL 3873423, at *11 (T.T.A.B. Aug. 5, 2008) (finding WAL-VERT for allergy medications likely to cause confusion with Wyeth's ALAVERT). Although the WAL-VERT decision was vacated on agreement of the parties following a non-public settlement between Walgreens and the opposer while the appeal was pending, no legal findings made by the Board or any of the reasoning set forth therein were ever overturned; rather, Walgreens simply arranged – likely because of this case – to have the decision erased from the books as a condition of settlement. Walgreens' failure to disclose the existence of this decision to the Board, as well as its negotiated effort to undercut its significance, should not go overlooked in evaluating the credibility of Walgreens' position here.

Finally, as to McNEIL's dilution claim, Walgreens' attempt to defeat it is unavailing. Despite Walgreens' effort to comb through the trial record for hand-picked "admissions" on the notoriety of the ZYRTEC brand, the mark is unquestionably famous, with unparalleled sales and advertising over a 15-year period. Moreover, the Board's recent decision in *Nike, Inc. v. Maher*, Opp. No. 91188789, 2011 WL 3828723, at *5-6 (T.T.A.B. Aug. 9, 2011) (finding JUST JESU IT to dilute Nike's JUST DO IT slogan) makes clear that an applicant's mark need only call to mind the opposer's mark in order to prove dilution by blurring under the Lanham Act. And the Board should be mindful that it was Walgreens' counsel who represented Nike in that proceeding.

In sum, the Board should see Walgreens' WAL-ZYR mark for what it is: a blatant effort to capitalize on McNEIL's ZYRTEC brand in order to maximize sales of a product with the same active ingredient, but which is not the same. This opposition should be sustained.

INACCURACIES IN WALGREENS' FACTUAL STATEMENT

Though a number of the facts in this case are undisputed, we note a number of inconsistent statements in Walgreens' testimony as to the relevant facts, as follows:

First, Walgreens states that "green is a common color used with the allergy category," but provides no evidence of that fact. App. Tr. Br. at 12. To the contrary, *none* of the leading products in the allergy category use green other than ZYRTEC – one need only walk into a drug store to see the colors associated with the top allergy brands, including Claritin (blue), Benadryl (pink), Allegra (purple), Tavist (blue), and Sudafed (red).

Second, Walgreens argues that McNEIL is fabricating Walgreens' intent to "convey a connection" between the parties' products by "twisting" its witness testimony about Walgreens' intent to convey equivalence. App. Tr. Br. at 11 n.2. Yet Walgreens' own witness Daniel Potts¹ testified that Walgreens chose the WAL-ZYR name specifically because of the connection it conveys to the ZYRTEC brand. Discovery Deposition of Daniel Potts, taken May 1, 2009 ("Potts Dep.") Opp. Ex. 108 at 40:17-21.

Third, despite Walgreens' arguments at pages 16-17 and 22-26 of its trial brief, the various agreements

Redacted

Redacted

clearly set forth legally operative facts to establish McNEIL's standing and priority in this proceeding:

Redacted

¹ McNEIL inadvertently neglected to include the discovery disposition testimony of Daniel Potts, taken May 1, 2009, in its Trial Brief summary of evidence. However, McNEIL included Mr. Potts' deposition testimony in its Notice of Reliance on Applicant's Deposition Testimony and Appendix listing Opposer's Exhibits, and Walgreens did not object to the introduction of Mr. Potts' testimony in its Statement of Objections to Opposer's Evidence.

Redacted

Finally, as stated in Opposer’s Statement of Objections to Applicant’s Evidence (“Opp. Obj.”), Dr. Simonson’s Report of a Survey to Determine the Likelihood of Confusion, If Any, Between WAL-ZYR Allergy Medications and ZYRTEC (“Survey”), submitted by Walgreens, is unreliable and improper on the issue of likelihood of confusion²:

- The universe of respondents in the Survey did not reflect the actual purchasers of the products at issue, and the Survey was conducted in inappropriate locations. Opp. Obj. at 2, 6.
- The Survey failed to test for the types of confusion at issue in this proceeding, including but not limited to consumer confusion as to the existence of a special arrangement between McNEIL and Walgreens concerning Walgreens’ generic ZYRTEC equivalent (as opposed to other generics). *Id.* at 3-4.
- The control mark itself, WAL-ZEE, skewed the results of the Survey by cancelling out the level of confusion in the test group with confusion in the control group due to an association of “ZEE” to the ZYRTEC brand, often conjured up in McNEIL’s advertising by references to the letter “Z.” *Id.* at 3.

² Walgreens’ citation of the McCarthy treatise, App. Tr. Br. at 41 (citing 6 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 32:189 at 32-408 (4th ed. 2011) (“McCarthy”)), regarding surveyed levels of confusion is out of context and misleading. The cited section, entitled “Evidence of no likelihood of confusion,” includes percentages of confusion in cases where no likelihood of confusion was found. Walgreens failed to note the previous section, entitled “Evidence of a likelihood of confusion,” which references a number of cases in which likelihood of confusion was found in connection with surveys showing levels of confusion of less than 10%. *See* 6 McCarthy § 32:188 at 32-407 – 32-408 (citations omitted).

- Though as Walgreens states, McNEIL did not call into question Dr. Simonson's credentials, this particular survey, conducted at Dr. Simonson's behest but with a significant level of detachment,³ was not conducted properly, *id.* at 5-11, for, *inter alia*, the following reasons:
 - The Survey used confusing and open-ended questions leading to ambiguous or incorrect answers.
 - The Survey suffered from errors in the recording of results on the part of the interviewers and discrepancies in verification of Survey respondents for which Dr. Simonson did not account.
 - Even after Dr. Simonson corrected his testimony as to inaccuracies in his calculations (likely due to his shoddy manual "counting" procedure), Walgreens failed to put on the record a revised figure for the level of confusion. Had the level of confusion been revised to include the uncounted confused respondents (one of which Dr. Simonson specifically identified as confused but not counted, *see* Simonson Dep. at 105:14-21 and Simonson Errata, and eight of which Dr. Simonson identified as in an "ambiguous" category of confusion during his deposition, *see* designated portions of Simonson Dep. at 88:23-105:21), confusion would have been 5% if respondents who thought the WAL-ZYR brand was related to or affiliated with or associated with the ZYRTEC brand or the makers of ZYRTEC products were counted.⁴
- The lack of reliability of the Survey is further evidenced by Dr. Simonson's testimony concerning an opposition proceeding brought by the makers of the ALAVERT brand against Walgreens' WAL-VERT brand, in which the Board found a likelihood of confusion to exist. Dr. Simonson identified that study as resulting in a degree of confusion of **Redacted** (see Simonson Dep. at 115:16-117:8) – a level of confusion only **Redacted** of that identified in the Survey between the WAL-ZYR and ZYRTEC brands (3 to 3.5%), and **Red.** of the more correctly calculated level of confusion (5%).⁵ See Simonson Aff. ¶ 7. Opp. Obj. at 9-11. As noted above, the Board found likelihood of confusion in the WAL-VERT matter despite Dr. Simonson's survey and testimony.

³ Dr. Simonson notably did not have first-hand knowledge of the instructions given to Survey interviewers and did not know whether interviewers exhausted possible responses or asked certain follow-up questions. See Simonson Dep. at 68:7-70:21, 72:25-73:23.

⁴ Accounting for respondents who were confused and thought that the WAL-ZYR brand was related to or affiliated with or associated with the ZYRTEC brand or the makers of ZYRTEC products, 6.9% (14 out of 203) of respondents who were shown the WAL-ZYR card were confused (as compared to the unverifiable 5% stated in the survey results), and 3% (6 out of 201) of respondents who were shown the WAL-ZEE card were confused (as compared to the 1.5% stated in the survey results). Using these calculations, the survey yielded a net result of 5% confusion (as compared to the 3% to 3.5% stated in the survey results). See Opp. Obj. at 10-11. This number would be even higher if WAL-ZEE confused respondents were also counted since the "Z" itself contributed to the level of confusion.

⁵ As stated above, in light of Dr. Simonson's correction of his counting mistakes, this number should be almost twice as high when accounting for the confused respondents originally uncounted.

ARGUMENT

I. McNEIL Has Established Priority

In an attempt to distract the Board from the merits of McNEIL's likelihood of confusion and dilution claims, and despite the evidence and uncontroversial legal conclusions in McNEIL's Trial Brief ("Opp. Tr. Br.") (*see* pp. 24-47), Walgreens argues that McNEIL lacks priority over Walgreens. Walgreens' argument is based on precedent that stands for the proposition that an opposer who is a licensee cannot automatically rely on the registration owned by its non-party licensor, and that use and rights must be proven separately. *See* App. Tr. Br. at 22-23 (citing cases).⁶

Walgreens' argument completely misses the point. McNEIL is *not* relying on UCB's ZYRTEC registration to establish priority. Rather, it is relying on the long-standing prior use of the ZYRTEC mark by McNEIL's predecessor-in-interest (Pfizer, through its subsidiary Warner), such use of which Walgreens is well aware since it sold ZYRTEC for more than a decade before Walgreens filed its WAL-ZYR application. *See* App. Tr. Br. at 10; Testimonial Deposition of Robert Tompkins, taken March 28, 2011 ("Tomp. Dep.") at 10:16-23. Put another way, because McNEIL acquired its license by assignment from former licensee Pfizer/Warner, rather than independently from UCB, McNEIL stepped into Pfizer's shoes and can rely on its prior use. 2 McCarthy § 16:5 at 16-11 (assignee in a valid trademark assignment acquires priority); 3 McCarthy 18:16.50 at 18-37 (same); *see also Carnival Brand Seafood Co. v. Carnival Brands, Inc.*, 51 U.S.P.Q.2d 1929, 1931 (11th Cir. 1999) (for purposes of priority, assignee "steps into the shoes of the assignor"); *Lone Star Steakhouse & Saloon, Inc. v. Alpha of Va., Inc.*, 33 U.S.P.Q.2d 1481, 1487 (4th Cir. 1995) (while defendant had seniority over plaintiff's own use,

⁶ The cases cited by Walgreens are distinguishable in any event. In *Chemical New York Corp. v. Conmar Form Systems, Inc.*, the owner of a registration and two of its subsidiaries opposed an application, where all three entities claimed priority in the mark based on separate, but concurrent use, yet one subsidiary failed to introduce any evidence thereof. 1 U.S.P.Q.2d 1139, 1142 (T.T.A.B. 1986). In *Hunt Control Systems Inc. v. Koninklijke Philips Electronics N.V.*, the Board held that for the purpose of a statutory presumption, a subsidiary may not rely on the registration date of a holding company that owned the mark but made no use of it. 98 U.S.P.Q.2d 1558, 1562-63 (T.T.A.B. 2011). None of these facts are present here.

plaintiff obtained an assignment of rights from a third user who was senior to defendant; hence, plaintiff became the senior user). Therefore, 1996, the first date that the ZYRTEC mark was used in commerce by Pfizer in connection with allergy medications (Testimonial Deposition of Rohinish Hooda, dated January 13, 2011 (“Hooda Dep.”) at 12:21-13:13; Donohue Dep. at 103:24-104:18 & Ex. 7), is thus McNEIL’s priority date for purposes of this proceeding, which is over a decade before Walgreens’ application date.

The only question, therefore, is whether the evidence demonstrates that McNEIL acquired Pfizer’s rights to promote and sell ZYRTEC in the United States. As set out in McNEIL’s trial brief at pages 5-7 and above at pages 4-6, as well as the cited record evidence, Pfizer/Warner held the rights to market and sell ZYRTEC products, which it then sold to McNEIL and its related companies, and which McNEIL has since exercised for the past five years. The contracts unquestionably cover McNEIL’s licensed use of the ZYRTEC mark.⁷ *Id.* General principles of contract interpretation further enforce this point: but for UCB’s grant of a license to the ZYRTEC mark in the OTC License Agreement, the references thereto in the Purchase Agreement and Bill of Sale would make no sense. *See John Anthony, Inc. v. Fashions by John Anthony, Inc.*, 209 U.S.P.Q. 517, 525 (T.T.A.B. 1980) (contracts consistent with claim that opposer’s use of the mark was made pursuant to an oral license, and were further evidence that such a license was made).

Walgreens’ suggestion that McNEIL somehow only acquired a “new” licensed right to the ZYRTEC mark OTC, separate and apart from Pfizer’s prior prescription sales, depriving it of

⁷ To the extent Walgreens suggests that the various inter-corporate dealings are not evidenced by the agreements, a valid trademark license need only be verbal. 3 McCarthy § 18:43 at 18-90 (“a license can be oral”), *see, e.g., Basic Inc. v. Rex*, 167 U.S.P.Q. 696, 697 (T.T.A.B. 1970) (finding valid oral license for purposes of priority date, where approval was based on party’s testimony and the licensee’s prior use of the mark, and the Board found evidence of elements of control); *Nestle Co. v. Nash-Finch Co.*, 4 U.S.P.Q.2d 1085, 1088-89 (T.T.A.B. 1987) (though no written license existed and the licensee did not pay royalties, the Board found an oral license to exist based on the licensor’s approval of the licensee’s use – partly evidenced by licensee’s purchase of goods from licensor – and some quality control conducted by the licensor). The commercial realities, namely, the continuous availability of ZYRTEC allergy medication from 1996 through the present under UCB’s formula more than satisfies the inquiry.

the right to rely on Pfizer's past use in this proceeding (App. Tr. Br. at 16-17, 23-25), ignores the facts and the commercial reality when drugs make an OTC switch. As the record makes clear, when a patent on a prescription drug expires and generic competition enters the market, the brand owner commonly seeks approval from the FDA to sell the branded drug OTC. *Tomp. Dep.* at 10:16-11:2; *Hooda Dep.* at 19:21-22:25. *See also Walgreen Co. v. AstraZeneca Pharm. L.P.*, 534 F. Supp. 2d 146, 148-49 (D.D.C. 2008) (discussing mechanics of prescription to OTC switch; dismissing Walgreens' antitrust claim based on defendants' alleged market positioning for certain prescription and over-the-counter drugs). Once approved by the FDA, the drug transitions from one that is only available with a doctor's prescription to one that may be bought in a drug store.⁸ *Hooda Dep.* at 18:20-19:12. Since McNEIL acquired Pfizer's consumer healthcare business around the time of the ZYRTEC transition, there was *no commercial or legal need* for it to also acquire any separate right to sell ZYRTEC product by prescription. Had McNEIL acquired a license to make ZYRTEC clothing, creating a new product with new trademark rights, Walgreens' priority argument might make sense. But, of course, this is not what happened. The fact is that McNEIL stepped into Pfizer's role as the exclusive licensee, manufacturer and distributor of ZYRTEC at the time of the transition.

McNEIL has established priority.

II. A Likelihood of Confusion Exists

Turning to the merits of McNEIL's claim under section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), a review of the *Du Pont* factors shows that McNEIL has demonstrated that a likelihood of confusion exists. The ZYRTEC mark is undeniably strong, both conceptually and commercially,⁹ and Walgreens acknowledges that its WAL-ZYR products are effectively

⁸ This explains why there is usually a slight overlap between the last prescriptions filled and the drug's availability over the counter (thus explaining why prescription ZYRTEC continued to be available in early 2007). *See Hooda Dep.* at 19:13-20:19, 185:16-23.

⁹ The strength of the ZYRTEC mark has been shown by overwhelming evidence on the record. *Opp. Tr. Br.* at 28-31. Walgreens cannot discount the relevance to a finding of the strength of a mark of extensive prescription sales or advertising and marketing directed to certain demographics. *App. Tr. Br.* at 31-32. All such evidence proves the depth to which ZYRTEC branding is embedded at all levels. Further, Walgreens' effort to create any confusion as to the nature of Pfizer's advertising expenditures is wrong, *App. Tr. Br.* at 31, as McNEIL's witness

identical to McNEIL's ZYRTEC products, and promoted and sold to the same consumers under identical conditions in the same trade channels. App. Tr. Br. at 26. Walgreens further does not dispute that its WAL-ZYR was designed to evoke the ZYRTEC mark, that WAL-ZYR packaging incorporates numerous designations intended to call to mind the ZYRTEC brand, and that it positions its WAL-ZYR products directly next to ZYRTEC products. See App. Tr. Br. at 11-14, 27. Much of Walgreens' trial brief focuses on its desire to provide consumers with "options," yet, as noted above, there is no evidence that Walgreens *needs* the ZYR portion of McNEIL's mark in order to successfully sell its WAL-ZYR product.

A. The WAL-ZYR Mark is Substantially Similar to the ZYRTEC mark

Walgreens' brief does little to negate the similarity of the marks, failing to counter the glaring similarities between WAL-ZYR and ZYRTEC packaging and misinforming the Board as to the colors used in the allergy category and its intent to create a connection between the parties' products. See Inaccuracies in Walgreens' Factual Statement, *supra*. Essentially, Walgreens co-opted the dominant portion of the ZYRTEC mark – "ZYR" – after its extensive research showed the "ZYR" to better conjure up the ZYRTEC brand. See Potts Dep., Opp. Ex. 108 at designated portions of 30:13-41:12. And Walgreens admits the most telling point: that WAL-ZYR communicates to consumers that the product is the "Walgreens version of ZYRTEC," App. Tr. Br. at 27, which falsely creates an impression that Walgreens' generic cetirizine HCl product has some special relationship with ZYRTEC and McNEIL that its competitors do not.

Walgreens' own testimony supports McNEIL's position that "ZYR" is the most dominant portion of both parties' marks. Regarding ZYRTEC, "ZYR" is the most prominent portion of the mark because: (i) it is the beginning of the mark and thus "the most important or prominent in the eyes of consumers," App. Tr. Br. at 26, and (ii) of McNEIL's, Pfizer's, and Walgreens' own extensive promotion of the first letter, "Z," Hooda Dep. at 47:19-23, 93:11-94:13 & Opp. Exs. 22-23. Mr. Potts, who personally participated in the development of the WAL-ZYR mark,

Mr. Hooda clarified for Walgreens' counsel at his deposition the difference between media expenses alone versus the entirety of advertising and marketing expenditures. Hooda Dep. at 187:22-188:11.

admitted that Walgreens chose WAL-ZYR because they believed “people would have connected the ZYR [to ZYRTEC] more than the TEC.” Potts Dep., Opp. Ex. 108 at 28:4-6, 40:11-41:12. That the first syllable is dominant cannot be said about WAL-ZYR, however. Walgreens’ use of “WAL-” on dozens of products dilutes its impact as “people have grown accustomed to” the “WAL-” prefix, used with its private labels as simply “a prefix followed by something that connects with the name brand name.” *See* Potts Dep., Opp. Ex. 108 at 40:5-10; *see* App. Tr. Br. at 9-10 (explicitly identifying 18 such brands in Applicant’s Response and Objections alone). Consumers cannot tell Walgreens’ “WAL-” product names apart but for the second portion of these marks, and thus the “ZYR” in WAL-ZYR must be viewed as dominant.

Moreover, even if certain WAL-ZYR packaging elements lessened the likelihood of confusion (they do not), Walgreens cannot rely on its packaging to defeat a claim of similarity of the marks. It is well settled that the presence of its house mark or additional elements is irrelevant where those elements are not reflected in the opposed application. *See Hasbro, Inc. v. Braintrust Games, Inc.*, Opp. No. 91169603, slip op. at 11-12 (T.T.A.B. Aug. 24, 2009) (citing *In re Bercut-Vandervoort & Co.*, 229 U.S.P.Q. 763, 764 (T.T.A.B. 1986)).

Finally, although the parties’ products are presently sold side-by-side in Walgreens’ stores, the Board cannot assume that consumers will always be shown the marks in the same manner. *See Sealed Air Corp. v. Scott Paper Co.*, 190 U.S.P.Q. 106, 108 (T.T.A.B. 1975); *see also In re Knox Fertilizer Co.*, Ser. No. 77029965, 2010 WL 3351810, at *2 (T.T.A.B. Aug. 13, 2010) (non-precedential). This enhances the likelihood of confusion since purchasers may encounter the marks in entirely different contexts within Walgreens’ stores, *see Dassler KG v. Roller Derby Skate Corp.*, 206 U.S.P.Q. 255, 259 (T.T.A.B. 1980), and further, at any point in the future Walgreens could sell or assign its WAL-ZYR mark to a third party – particularly if it is allowed to register the mark – obviating any impact of Walgreens’ current packaging.

The similarity of these two word marks thus favors McNEIL.

B. Walgreens’ “WAL-” Family and “Free Competition” Arguments Fail

Walgreens seeks to rely on its purported family of “WAL-” marks as a defense in this proceeding. Such evidence is irrelevant since the adoption of an infringing mark within a pre-existing family of marks cannot avoid a likelihood of confusion. 4 *McCarthy* § 23:61 at 23-264.32. The Board’s determination must be limited to a consideration of the marks at issue. *See Blansett Pharmacal Co. v. Carmick Labs. Inc.*, 25 U.S.P.Q.2d 1473, 1477 (T.T.A.B. 1992) (where registered mark NOLEX was held similar to prior-used NALEX for nasal decongestants, use by respondent of “other NOL-prefixed marks has no bearing on this [cancellation] proceeding”).

Even if the defense were available, Walgreens’ argument that its use of the “WAL-” prefix connotes Walgreens, thus diminishing any potential for confusion (*see* App. Tr. Br. at 9), is unsupported by the evidence. Walgreens’ own testimony and Survey show that the “WAL-” often signifies other companies to consumers, such as Wal-Mart. *See* App. Tr. Br. at 47, Survey at 11-12. It is therefore clear that consumers do not identify “WAL-” formative marks with a single source, leaving them only with the “Zyr” to answer that question. This will invariably lead consumers to think that WAL-Zyr is made by or affiliated with the same company as the related national brand product, namely McNEIL.

Finally, Walgreens’ argument that sustaining this opposition would be a deterrent to free competition is truly absurd. *See* App. Tr. Br. at 42, 47. No evidence to this effect is in the record. Moreover, any order of the Board will have no impact on Walgreens’ ability to sell the WAL-Zyr product or any other product, whether under that name or another one. As Walgreens is well aware, the Board only has jurisdiction over registrations. Moreover, Walgreens has many competitive tools available to it which allow it to effectively promote its private label generics, including “compare to,” close product placement, and trade dress, that “call to mind” the brand name product. The Board should not be fooled into adding the adoption of the dominant portion of a brand name trademark into that toolbox. At the end of the day, the

fact that WAL-ZYR is used on a private label product does not excuse the mark from the usual likelihood of confusion analysis.

C. Walgreens' Evidence of Consumer Care is Self-Serving and Unsupported

On the issue of the care taken by consumers, Walgreens put forth self-serving testimony unsupported by any real evidence. App. Tr. Br. at 33-35. The only qualifications of Walgreens' Mr. Tompkins to speak on this issue is that he is an employee of Walgreens, a party in interest. Moreover, Walgreens' reliance on the specific holding of *Conopco Inc. v. May Dep't Stores Co.* is misplaced since that decision deals with trade dress infringement, whereas the case at hand addresses registration only. 32 U.S.P.Q.2d 1225, 1231 (Fed. Cir. 1994). See App. Tr. Br. at 34. The fact remains that ZYRTEC and WAL-ZYR products are relatively low-cost products sold over-the-counter to ordinary consumers who have no special knowledge or expertise. See Opp. Tr. Br. at 10-11; Hooda Dep. at 50:23-51:12; App. Tr. Br. at 13. At the end of the day, no matter how hard Walgreens tries to frame the consumer care factor in relation to whether consumers spend one or two minutes in the allergy aisle, or to consumer beliefs as to the source of private label manufacturing, no degree of care can alter the existence of consumer perception of the sponsorship, approval or endorsement of a given pharmaceutical product – the very type of confusion at issue in this proceeding. See *Eli Lilly & Co. v. Natural Answers, Inc.*, 86 F. Supp. 2d 834, 843 (S.D. Ind. 2000); 3A Louis Altman, *Callman on Unfair Competition, Trademarks & Monopolies* § 21:11. Thus, because McNEIL's claim includes confusion relating to sponsorship or approval, in addition to simple product confusion, this factor must favor McNEIL.

D. Walgreens Prevented Actual Confusion from Being Adequately Measured

The parties agree that there has been limited evidence of actual confusion, but disagree as to why. Walgreens has no answer to the evidence relied on by McNEIL that Walgreens has no means to record instances of confusion in its own stores – the only place where both ZYRTEC and WAL-ZYR are sold together – thus explaining why few such instances have been documented. See, e.g., Potts Dep., Opp. Ex. 108 at 213:13-18 (testifying that no record would be made of, for instance, a consumer asking a Walgreens' employee “Do the people who make

ZYRTEC also make WAL-ZYR?”). Moreover, even the comments cited in Walgreens’ brief and Survey evidence consumer confusion as to whether the WAL-ZYR and ZYRTEC products are the “same.” *See* App. Tr. Br. at 19-20. In any event, even if the record had no instances of actual consumer confusion, proof of actual confusion is not required on a section 2(d) claim. *Blansett Pharmacal*, 25 U.S.P.Q.2d at 1476. So this factor favors McNEIL; at worst, it is neutral.

E. Walgreens’ Own Testimony Evidences Its Bad Faith

Finally, Walgreens’ admission that it promoted and sold the WAL-ZYR product as “Walgreens version of ZYRTEC” settles the issue of Walgreens’ bad faith. *See* App. Tr. Br. at 27. Walgreens concedes that the “purpose” of the WAL-ZYR mark (which it claims it accomplishes well) is to “suggest to consumers that that brand is . . . Walgreens version of the ZYRTEC product.” *Id.* Walgreens’ attempts to copy have been ongoing beyond the original name choice and product design: even though the original WAL-ZYR packaging (designed without a ZYRTEC package to directly copy) successfully “suggested” the ZYRTEC brand, Walgreens changed its WAL-ZYR packaging after the ZYRTEC over-the-counter launch to directly mimic and “look more comparable to” the ZYRTEC packaging. *See* Potts Dep., Opp. Ex. 108 at 154:10-155:16, 157:4-7; Hooda Dep. at 97:21-98:17. Walgreens had no reason to make such a change other than to create a direct association to the ZYRTEC packaging placed beside it on Walgreens’ shelves.

Had this not been its intent, Walgreens would not have referenced the dominant portion of ZYRTEC in the WAL-ZYR name, but would instead have referenced the active ingredient or the second syllable (“TEC”), as it does for most of its private label products. Only three of the 18 “WAL-” marks cited in Walgreens’ Brief (just over 15%) correspond to the alleged WAL-ZYR naming scheme, whereas the remaining 15 “WAL-” marks follow Walgreens’ standard naming policy, using references to either the active ingredient itself or the second syllable of the

national brand.¹⁰ Further, if Walgreens' acts were not in bad faith, it would not have placed WAL-ZYR products in ZYRTEC promotional displays. *See Hooda Dep. at 49:25-52:20, 63:22-64:12 & Opp. Ex. 22.*

McNEIL respectfully submits that the overwhelming evidence of bad faith here, particularly Walgreens' admission that its mark was designed to misleadingly tell consumers that WAL-ZYR was a generic version of ZYRTEC, as opposed to a generic product that contains the same active ingredient as the brand name drug ZYRTEC, should weigh heavily in favor of a finding of likelihood of confusion.

* * *

In short, Walgreens admits that the majority of the likelihood of confusion factors favors McNEIL, and its arguments against those it contends do not fall short.¹¹ McNEIL has therefore established that registration of WAL-ZYR would be in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d), in view of its prior rights in ZYRTEC.

III. The WAL-ZYR Mark is Likely to Dilute the ZYRTEC Mark Under the TDRA

Under the Trademark Dilution Revision Act of 2006 ("TDRA"), Walgreens' WAL-ZYR mark dilutes the famous ZYRTEC mark by blurring its distinctiveness. Lanham Act Section 43(c), 15 U.S.C. § 1125(c). McNEIL has established its claim of dilution because the ZYRTEC mark achieved fame prior to the date of Walgreens' application, and the association that arises from the similarity of the WAL-ZYR mark to the ZYRTEC mark impairs the distinctiveness of the famous ZYRTEC mark. *See Nike*, 2011 WL 3828723, at *14.

¹⁰ As much as Walgreens feigns hurt feelings and calls McNEIL's statements as to Walgreens' admitted misstatements about its "WAL-" naming scheme "inflammatory" and "nasty," *see App. Tr. Br. at 28-29*, the evidence on the record shows that Mr. Tompkins misstated the facts, resulting in a false or misleading impression, and that Walgreens did in fact stray from its standard naming scheme in developing the WAL-ZYR name.

¹¹ While the decision in *Wyeth v. Walgreen Co.*, Opp. No. 91165912, 2008 WL 3873423 (T.T.A.B. 2008) (Walgreens' WAL-VERT found likely to cause confusion with Wyeth's ALAVERT), has been vacated following the parties' settlement of that matter, McNEIL respectfully submits that the highly similar factual and legal premise of that proceeding (same applicant, same branding scheme on allergy medication) should provide insight to the Board's decision here.

A. The ZYRTEC Mark Achieved Fame Prior to Walgreens' Application

The fame and recognition of the ZYRTEC mark prior to Walgreens' application date has been established by "the duration, extent, and geographic reach of advertising and publicity of the mark" by both "the owner or third parties," "the amount, volume, and geographic extent of sales of goods or services offered under the mark," and "the extent of actual recognition of the mark." *Nike, Inc. v. Maher*, Opp. No. 91188789, 2011 WL 3828723, at *6 (T.T.A.B. Aug. 9, 2011). Advertising and publicity of the ZYRTEC mark has occurred continuously throughout the country for fifteen years, reaching "wide demographic segments, across gender, age and lifestyle categories." *Id.* at *11. Hooda Dep. at 103:3-105:3, 121:19-132:23 & Opp. Exs. 48, 71-76, 78. In addition to the lengthy duration and wide geographic reach, the extent of ZYRTEC brand advertising and publicity is undeniable, with McNeil's predecessor in interest¹² spending roughly Redacted annually from 1996 into 2007 to advertise and promote the ZYRTEC mark. Hooda Dep. 94:8-13, 186:16-188:4 & Opp. Exs. 70, 72-74. As in *Nike*, McNEIL has proved that ZYRTEC brand advertising campaigns have been "extensive and widespread" due to the large amount expended and where placements were made, including television commercials, print advertising in numerous magazines and newspapers, and an extensive Internet presence, Hooda Dep. at 24:4-25:14, 48:4-50:22, 58:20-78:12, 86:17-96:8, 99:3-10, 130:11-133:8 & Opp. Exs. 4, 22-26, 30-41, 45, 78. *Nike*, 2011 WL 3828723 at *11. Brand promotion for ZYRTEC has also received awards and accolades, Hooda. Dep. at 114:23-118:9 & Opp. Exs. 63-66, and involved celebrity collaboration, Hooda Dep. at 84:18-88:8 & Opp. Exs. 29-30. *See Nike*, 2011 WL 3828723 at *11.

The amount, volume and geographic extent of sales of ZYRTEC products over the last fifteen years also all clearly evidence fame. Sales of McNEIL's ZYRTEC products – with Red. Red. prescriptions and Red. pills sold by Pfizer for sales in excess of \$12.5 billion, Hooda Dep. at 126:19-130:8 & Opp. Ex. 75-77, far outweigh sales of products in *Nike*, which were

¹² The Board's recent ruling in *Nike, Inc.* bars any argument by Walgreens that Pfizer's advertising and sales are not relevant, *see* App. Tr. Br. at 30, specifically identifying efforts of "third parties" as relevant evidence of fame. *Nike*, 2011 WL 3828723 at *6.

found to sufficiently evidence fame. *See Nike*, at *9-10 (citing net sales of \$175 million). In fact, the high degree of ZYRTEC product sales is proven by Walgreens' sales of ZYRTEC alone, as it dispensed countless ZYRTEC prescriptions prior to the filing of its application. *See* *Tomp. Dep.* at 10:16-19.

The extent of actual recognition of the ZYRTEC mark as a source-indicator for McNEIL's goods and services, identified as the most important element of a fame determination for dilution purposes, *Nike*, 2011 WL 3828723 at *16, is also established by evidence on the record, including: (a) ZYRTEC medication's distinction of being the number one prescription allergy medication in the country at the time of Walgreens' application,¹³ (b) the ZYRTEC brand holding the second largest market share in the allergy market,¹⁴ and (c) the "pervasive . . . third-party references to and discussions about" the ZYRTEC mark and McNEIL's sales of over-the-counter ZYRTEC products.¹⁵ *Nike*, 2011 WL 3828723 at *7. Further, as in *Nike*, the ZYRTEC brand received accolades for its brand recognition and ingenious over-the-counter marketing and promotional campaigns. *Hooda. Dep.* at 114:23-118:9 & *Opp. Exs.* 63-66. *See Nike*, 2011 WL 3828723 at *8 (citing inclusion by *Advertising Age* of JUST DO IT mark in survey of memorable slogans).

Walgreens only half-heartedly attempts to discount the categorical fame of ZYRTEC. How could it do otherwise, since Walgreens chose WAL-ZYR as a trademark for its generic cetirizine HCl product in order to best capitalize on consumers' recognition of the ZYRTEC

¹³ *See Hooda Dep.* at 47:16-72:2 & *Opp. Ex.* 22 at 1052; *Tomp. Disc. Dep., Opp. Ex.* 107, at 43:7-15.

¹⁴ *Hooda Dep.* at 70:25-71:15, 106:2-109:23 & *Opp. Ex.* 50.

¹⁵ The ZYRTEC brand has been discussed in thousands of articles in national and local newspapers and magazines, as well as in various national and local television programs. *Hooda Dep.* 118:19-121:16 & *Opp. Exs.* 67-69, 71, 102-105. Walgreens' attempt to discount the extensive third party references due to the summary form in which they were presented fails, *see* *Response to Opposer's Statement of Objections to Applicant's Evidence and Applicant's Statement of Objections to Opposer's Evidence* at 16-17, as further set forth in *Opposer's Response to Applicant's Evidentiary Objections* on pages 2-3. Regardless of the means by which each individual third party reference came into being, the extensive reach and diverse demographic represented proves that the ZYRTEC mark "resonates over a broad spectrum of the public." *See Nike*, 2011 WL 3828723 at *9.

name, as opposed to the way it names its other private label products? *See Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 73 U.S.P.Q.2d 1689, 1694 (Fed. Cir. 2005) (copying is indicative of fame for dilution purposes); *cf. Coach Servs., Inc. v. Triumph Learning L.L.C.*, 96 U.S.P.Q.2d 1600, 1614 (T.T.A.B. 2010) (copying is evidence of acquired distinctiveness). Walgreens’ argument that the ZYRTEC mark “had very little market recognition” thus strains credulity and should be rejected.

Based on an analysis of the above factors, there is ample evidence in the record that the ZYRTEC mark is famous under the TDRA.

B. The WAL-ZYR Mark is Likely to Dilute the ZYRTEC mark

With fame of the ZYRTEC mark established, McNEIL has also demonstrated that the record supports a finding of likelihood of dilution under the TDRA. As to similarity of the marks, the Board does not conduct a “side-by-side” comparison, as Walgreens would have it do here, but one of “overall commercial impression” of the marks. *Nike*, 2011 WL 3828723 at *4. As Walgreens admits, the overall commercial impression of WAL-ZYR is that it is the Walgreens version of ZYRTEC. App. Tr. Br. at 27. Thus, “[u]pon encountering [the WAL-ZYR] mark, consumers will be immediately reminded of [the ZYRTEC mark],” thereby associating the two marks. *Nike*, 2011 WL 3828723 at *15. That consumers may be generally aware of private label products should not permit Walgreens to bypass the dilution statute and trade on the goodwill and reputation built by McNEIL and its predecessors.

Moreover, the dilution statute applies to “look-alike” or “close enough” marks that make the consumer “recall the famous mark and be reminded of it,” *id.* at *14 – Walgreens’ actions in its design and marketing of the WAL-ZYR brand aim to have that very effect on consumers. *See, e.g.*, App. Tr. Br. at 12-14.¹⁶ The WAL-ZYR mark is “sufficiently similar [to the ZYRTEC mark] to trigger consumers to conjure up [the famous ZYRTEC] mark,” *see Nike*, 2011 WL 3828723 at

¹⁶ The Board in *Nike* notably eschewed the former, more stringent “substantial similarity” or “near identity” tests for dilution, omitting from the “similarity” factor any requirement of “substantial” similarity, “identity” or “near identity.” *Nike*, 2011 WL 3828723 at *14-17 (holding JUST JESU IT dilutive of JUST DO IT).

*14 – indeed, that is the very “purpose” of Walgreens’ strategy, to tell consumers that the product is Walgreens’ version of ZYRTEC. *See* App. Tr. Br. at 27. Though Walgreens repeatedly disputes McNEIL’s point that some consumers may think private label products are made by the related national brands, even if consumers “do not believe that [WAL-ZYR products] come from [McNEIL] . . .” “dilution occurs when consumers associate a famous mark . . . with a new and different source,” the potential for which Walgreens has already openly conceded. *Nike*, 2011 WL 3828723 at *14.


The remaining factors all weigh towards a finding of dilution, too: the evidence of exclusive use and extensive advertising and sales of McNEIL’s predecessor, as well as the ZYRTEC brand’s position as number one in the prescription allergy market, shows that the ZYRTEC mark is extremely well-recognized, and Walgreens has effectively admitted it sought to associate WAL-ZYR with ZYRTEC in consumers’ minds. *See* App. Tr. Br. at 26. *See* section III(a), *supra*.

CONCLUSION

Walgreens’ WAL-ZYR mark is likely to confuse consumers and dilute the famous ZYRTEC mark. McNEIL respectfully submits that the Board should not be fooled by Walgreens’ rhetorical arguments about competition, its efforts to confuse and distract on priority, and its flimsy arguments on likelihood of confusion and dilution. Indeed, Walgreens’ own brief has done much of the work here, admitting that WAL-ZYR communicates to consumers that the product sold in connection with it is the “Walgreens version of ZYRTEC.” For the foregoing reasons, and for the reasons set forth herein and in its trial brief, McNEIL submits that the evidence establishes both a clear likelihood of confusion and dilution arising from the registration of Walgreens’ WAL-ZYR mark. Accordingly, McNEIL respectfully requests that this opposition be sustained, that registration of Application Serial No. 76/682,070 be denied and that judgment for McNEIL be entered in this proceeding.

Dated: September 13, 2011

Respectfully Submitted,

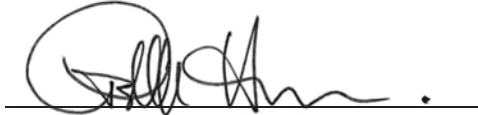


James D. Weinberger
Laura Popp-Rosenberg
Giselle C.W. Huron

FROSS ZELNICK LEHRMAN & ZISSU, P.C.
866 United Nations Plaza
New York, New York 10017
Tel.: (212) 813-5900
jweinberger@fzlj.com
lpopp-rosenberg@fzlj.com
ghuron@fzlj.com

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing **Rebuttal Brief for Opposer** to be deposited with the United States Postal Service as First Class mail, postage prepaid, in an envelope addressed to counsel for Walgreen Co., Mark Liss, Esq., Leydig, Voit & Mayer, Ltd., Two Prudential Plaza, 180 N. Stetson Avenue, Suite 4900, Chicago, IL 60601, this 13th day of September, 2011.

A handwritten signature in black ink, appearing to read 'Giselle C.W. Huron', is written over a horizontal line.

Giselle C.W. Huron